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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 477

AMERICAN EXPORT LINES, INC.,
Petitioner,

—against—

CATERPILLAR OVERSEAS, S. A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on June 20, 1963, and amended July 9, 1963.

CITATIONS TO OPINIONS BELOW

Both the original opinion of the United States District Court for the Southern District of New York Metzner, J., and the opinion on Reargument are printed on pages 1a to 10a of the Appendix to this Petition. The District Court dismissed the libel, and its Findings of Fact and Conclusions of Law appear in the Appendix-Record, Vol. I, pp. 102-107. The decision is reported in 210 F. Supp. 478. The Opinion of the United States Court of Appeals, Second Circuit, reversed the District Court and remanded

the case for a new trial. This Opinion is printed at page 11a of the Appendix. The Court on its own motion amended its Opinion on July 9, 1963, to omit the new trial. Another amendment corrected a misstatement as to Appellee's contention. This Opinion is found in 318 F. 2d 720.

JURISDICTION

Judgment was entered in the Court of Appeals for the Second Circuit on June 20, 1963. Appendix-Record, Vol. II, p. 78. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the Court of Appeals to hold that section 4(2)(q) of the Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et seq.*, applied to this case despite the fact that the loss occurred after the goods were discharged from the vessel.

2. Whether the provision in Section 1 of the Harter Act, 46 U. S. C. § 190, *et seq.* making unlawful clauses in bills of lading relieving ocean carriers "from liability for loss or damage arising from negligence, fault or failure in . . . proper delivery" prevents a shipowner and shipper from agreeing that where a ship must discharge into lighters at a foreign port and turn the goods over to a licensed lighterman, in accordance with local Port Regulations, the ocean carrier's responsibility shall terminate at the end of ship's tackle when the goods are safely discharged onto a lighter furnished in accordance with local law and custom.

3. Whether it was error for the Court of Appeals to raise against the owner of the ocean vessel a presumption

that a lighter which listed in calm weather was unseaworthy and to reverse on the grounds that the vessel owner had failed to explain the accident when (1) the ocean carrier did not own, operate or control the lighter and (2) libelant's surveyor, who investigated the cause of the accident, refused to produce the report of his findings and (3) no notice of claim had been filed against the ocean carrier.

4. Whether it was in error, in a case where evidence was presented to the Trial Court both by live witnesses and depositions, for the Court of Appeals to reverse summarily, without any showing that they were clearly erroneous, the Trial Court's findings of fact that the lighter was seaworthy and that the ship's stevedore made a normal and reasonably careful inspection of the lighter before discharging cargo, which inspection libelant's own expert witness, who was in charge of all such lighters at Tripoli, said was "a normal inspection like one he would make himself."

STATUTES INVOLVED

The statutory provisions involved are the Harter Act, 27 Stat. 445-446, 46 U. S. C. §§ 190-196, and the Carriage of Goods by Sea Act, 49 Stat. 1207-1213, 46 U. S. C. §§ 1300-1315. The relevant provisions are:

"46 U. S. C. § 190. Stipulations relieving from liability for negligence

"It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody,

care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

"46 U. S. C. § 1301. Definitions

* * *

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

"46 U. S. C. § 1303 (6) Notice of loss or damage; limitation of actions

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

* * * *"

"46 U. S. C. § 1304 (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

* * * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither

the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

STATEMENT OF FACTS

The following facts were presented by evidence which was *uncontradicted* at the Trial. Part of the evidence came from live witnesses and part from depositions.

On December 30, 1959, Caterpillar Overseas, S. A., a Swiss Corporation, shipped two tractors from New York to Tripoli, Libya, on Petitioner's vessel, the s/s Expeditor. The tractors were shipped to Caterpillar's agency at Tripoli. Because the vessel's draft was too deep for a berth at the small African port, lighters would have to be used to discharge cargo.

All lighterage at Tripoli was controlled by the Administration of Tripolitania, the local port authorities, which furnished lighters to licensed "Shipping Agents." Tripoli Port Regulations (Respondent's Exhibit J, Appendix-Record, Vol. II, pp. 59-60) provided that only companies authorized under a Shipping Agency License could act as Stevedores to receive cargo discharged into lighters. The Regulations provided further as follows:

"4. The limits of responsibility shall be as follows:

(i) In case of imports, when goods are discharged from a ship, the responsibility of a carrier . . . shall cease when such goods are removed from ship's tackle, and the responsibility of the Ports and Lights Department of the Administration of Tripolitania shall commence when such goods are removed from ship's tackle or received from lighter, and shall cease when such goods are

delivered in accordance with the instructions of the consignor or consignee.

* * *

"(iii) Where goods are transported by lighter, the responsibility of the shipping agent shall commence when such goods are received into such lighter . . . from ship's tackle . . . and shall cease when such goods are . . . delivered to quay."

Accordingly, Petitioner's Bill of Lading contained three pertinent clauses providing that the goods would be delivered upon discharge from the vessel at the end of ship's tackle into a lighter at Tripoli. Clause 1 provides that "*The Carrier shall not be liable in any capacity whatsoever for . . . loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier.*"

Clause 4 provides that the Carrier may discharge goods onto a lighter and when they are so discharged "*they shall be at their own risk and expense*" and "*such discharge shall constitute complete delivery and performance under this contract.*"

Clause 12 provides that the Carrier "*may discharge the goods directly they come to hand, at or onto any . . . craft . . . the carrier may select*" and repeats that "*use of craft in discharging shall be at the risk and expense of the goods.*"

At Tripoli, American Export employed W. E. Rippon & Son as ship's agent to arrange for a mooring and to provide longshoremen to discharge cargo from the vessel's holds. The Tripoli Port Regulations, cited supra, further provided that the "ship's agent shall nominate the stevedore" and "only companies or persons authorized under a shipping agency license may act as stevedores." Stevedore, as used in the Regulations, meant "the company or person authorized to take delivery of cargo . . .". Rippon, acting

as ship's agent, nominated itself as Stevedore since it was a licensed Shipping Agent in the Port of Tripoli. Rippon was a large organization which represented shipping companies as well as shippers and consignees in various capacities. (Appendix Record, Vol. II, page 18).

Accordingly, Rippon as a Shipping Agent obtained a lighter from the Administration and manned it. The vessel's Mate had control over the longshoremen in the hold, but not over the lighter or lighter men. (Appendix Record, Vol. II, p. 9, 19.)

As there was a shortage of lighters at Tripoli, the Administration had chartered the lighter in question from the U. S. Army. The Administration in turn chartered it to Rippon. The men who handled the cargo after discharge on the lighter were employed by Rippon. The Administration charged Rippon for use of the lighter (Respondent's Exhibit D, Appendix Record, Vol. II, p. 51). Rippon, as "Shipping Agent—Stevedores" for its own account—*not* as ship's agent—in turn charged Caterpillar's representative for 1) lighterage and 2) services in taking direct delivery from the vessel and in making delivery to the Administration on the quay. (Appendix Record, Vol. II, p. 52).

The accident in question took place after the shipment in suit had been completely discharged onto the Administration's lighter and delivered to Rippon as Shipping Agent. Accordingly, Rippon gave a clean receipt to American Export in the form of an Outturn Report containing no exceptions against the tractors which had fallen over board from the lighter. (Appendix Record, Vol. II, p. 54.) Significantly, eight days later, the Port's & Light's Authority of the Administration also issued to the vessel an Outturn

Report free of any exceptions against the shipment in suit. (Appendix Record, Vol. II, p. 55).

An Agreement covering use of lighters, entered into between Rippon and the Administration (Appendix Record, Vol. II, pp. 86-91) clearly specified that Rippon as lighter Hirer would be "*responsible for the proper stowage and handling of such goods during the aforesaid loading or unloading or conveyance and for the trim of the craft at all such time.*" (Appendix Record Vol. I, p. 88). The Agreement further provided that the Hirer (Rippon) "*shall not be held liable for any loss . . . caused by . . . the want of reasonable care on the part of the Administration to keep such . . . lighter, or other craft in a seaworthy condition . . .*" (Appendix Record Vol. I, p. 90).

Caterpillar's own witness, Mr. Williams, testified that the ship in this case had no choice of lighters. The U. S. Army lighter in question was newer than the lighters owned by the Administration. At the time of the accident, a practice existed in Tripoli of lighter users not to pump U. S. Army lighters. The opening of man-hole covers and the pumping of tanks was done regularly by an Army boat which moved about the port where the lighters lay. The reason for this is that the U. S. Army *would not permit* others to open the man-hole covers or pump the barges (Appendix Record Vol. I, p. 71). Williams testified the lighters were considered to be "in first class condition." There were no gaskets on the manholes, but this would let in only a very limited amount of water. Such lighters had been used successfully many times to discharge tractors.

Before discharge commenced, the ship's stevedore foreman went down on the lighter and made an inspection of the decks and sides. It appeared to him to be in a satisfactory condition. He also checked the lighter after each draft was landed. Mr. Williams, Caterpillar's witness, was Marine

Superintendent for the U. S. Army, in charge of Army lighters at Tripoli. He heard the foreman's testimony and he was asked to criticize the inspection:

> "Mr. DeOrchis:
>
> Q. Mr. Williams, based on your experience as a Master and your knowledge of seamanship and the custom of this Port, do you have any criticism of the inspection that this man made before he started to discharge the cargo? A. None whatsoever, it is a normal sort of inspection that I would carry out myself, prior to loading cargo."

Williams said the foreman was a "highly competent" stevedore.

The tractors were landed safely onto the lighter and dunnage and chocks were used by the lightermen. They did not lash the cargo. While the vessel was preparing to discharge additional cargo, the lighter listed toward the ship and the two tractors were cast overboard.

After the accident, Mr. Williams, who also carried out salvage operations and recovered the tractors, was appointed by Caterpillar's insurance underwriters to investigate the accident and survey the lighters. He issued a written Report of his inspection to Caterpillar's insurance company. He testified at Tripoli that after the accident the lighter was inspected and put in use again, and that this would not have been done if it had needed repairs. (Appendix Record Vol. I, p. 57). No structural defects were observed. Nevertheless, Mr. Williams testified for Libellant that, "My opinion is that unfortunately barge 8035, must have contained water in some sections and when heavy lifts landed the barge listed. ..." (Appendix Record Vol. I, p. 54).

Thereupon, Mr. Williams was asked to produce copy of his investigation Report, but he did not. He agreed to send

a copy to counsel, but he never did (Appendix Record, pp. 61-63). Appellant's counsel made *"every effort to get the report"* both from Mr. Williams and from his clients, but he could not. (Appendix Record Vol. II, pp. 2-3). Instead, Appellant put into evidence a survey report prepared weeks later by another surveyor, containing only hearsay as to water being in the lighter, and that report appeared to have been *falsified* in part. (Compare page 7 of report Appendix Record, Vol. II, p. 49 with page 7 of same report appearing Appendix Record Vol. II, p. 67. A paragraph relating to the water was *inserted* in the version reproduced at p. 49).

American Export did not appoint a surveyor to investigate the accident since Petitioner had received a clean receipt from Rippon and the Administration and considered that the accident occurred after the tractors had been delivered. The ship's Chief Mate testified that he was not in a position to explain the cause of the accident. Caterpillar's expert witness, Captain Kuhne testified that there were two other possible reasons for the accident: the lightermen may not have chocked the tractors properly after discharge or the tractors may have been shipped without their brakes set.

No proof was offered that a Notice of Claim was filed against American Export either at the time the tractors were delivered or within three days thereafter, as required by the Carriage of Goods By Sea Act.

The suit came up for trial before Judge Metzner, *D. J.*, in April, 1962, in the United States District Court, Southern District of New York. On June 4, 1962, Judge Metzner filed an Opinion holding the respondent not liable for the accident and dismissing the libel. The Trial Judge found the goods had been delivered before the accident and that at

any rate the lighter was seaworthy and "the loss was not caused by Respondent's negligence."

Libelant applied for reargument and presented a new theory for recovery. Judge Metzner filed a new Opinion on November 14, 1962, adhering to his original determination. Libelant filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

The Appeal was argued March 6, 1963, and on June 20, 1963, the Court of Appeals filed an Opinion reversing and remanding for a new trial. Subsequently, on July 9, 1963, on its own motion, the Court of Appeals entered an Order amending the original Opinion by withdrawing the remand for new trial and instructing that a Decree be entered in favor of the libelant. The Court of Appeals held (1) that the clauses in the bill of lading were unlawful under Section 1 of the Harter Act, (2) that the carrier had failed to sustain its burden of proof under Carriage of Goods By Sea Act, Section 4 (2) (q) because "as appellee failed to advance any explanation of this occurrence [careening of lighter in calm sea], a presumption of unseaworthiness arose which appellee failed to rebut," (3) that the Trial Court's finding of due care in the selection of the lighter could not be sustained because "Appellee's agent, a stevedore foreman, allegedly took a 5 or 10 minute walk over the deck of the lighter, prior to the tractor's off-loading, but no attempt was made to ascertain whether water was in the lighter's tanks, and no inspection was made of the lighter's sides." This, despite the facts that Caterpillar's own expert witness, who was in charge of such lighters at Tripoli, said it was a normal inspection same as he would make, that the foreman was highly competent and that opening tanks for inspection was not permitted. Moreover, the foreman testified both on direct and cross examination that he had inspected the sides. (Record Appendix Vol. I, p. 68).

REASONS FOR GRANTING THE WRIT

1. Erroneous Interpretation of C.O.G.S.A.

There was no dispute, and in fact it was stipulated in the Pre-Trial Order (Appendix Record, Vol. I, p. 12), that the two tractors in suit had been discharged from the ship *before* the accident occurred. C. O. G. S. A. specifically provides in 46 U. S. C. § 1301 (e):

> "The term carriage of goods covers the period from the time when they are loaded on to the time when they are discharged from the ship."

Nothing could be clearer. Yet the Court of Appeals applied § 1304 (2) (q) of the C. O. G. S. A. to this case and reversed the Trial Court on the ground that Petitioner failed to sustained the burden of proof provided in that section. It is submitted the decision of the Court of Appeals is clearly erroneous in this respect.

2. Erroneous Interpretation of the Harter Act.

The bill of lading clauses, Nos. 1, 4 and 12, which the Court of Appeals held null and void under the Harter Act are in common use in most bills of lading used in ocean commerce, not only by American flag vessels but by vessels of other nations. These clauses providing for "tackle to tackle" carriage and for substitute delivery to lighters at the expense and risk of the goods when direct delivery cannot be made to consignee have been in use long before the passage of both the Harter Act and the Carriage of Goods By Sea Act. Until now the courts have recognized them as clauses which measure the carrier's obligation under the contract of affreightment, not clauses which exculpate the Carrier from consequences of a breach or from liability for negligence during discharge or delivery. The decision of the Court of Appeals

comes as a blow to the shipping industry as it would force ocean carriers to take on the obligation of lighterage at foreign ports, even when as here delivery to lighters is necessary and the ocean carrier is not permitted by local law to operate lighters.

The decision of the Court of Appeals in the instant case is in conflict with the decision of the Supreme Court in *Constable* v. *National Steamship Co.*, 154 U. S. 51, 63 (1894), *The Delaware*, 161 U. S. 459 (1896), *The Eddy*, 72 U. S. 481 (1866), *The Tangier*, 64 U. S. 28, (1859), *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272 (1898), *The Boskenna Bay*, 40 Fed. 91 (C. C. S. D. N. Y. 1889), and the reasoned opinions of other courts who have passed on the validity of similar or identical clauses.

The Harter Act was passed in 1893 (46 U. S. C. §§ 190-196). The Supreme Court of the United States said in 1894 in *Constable* v. *National Steamship Co.*, 154 U. S. 51, 63: "No rule is better settled then that the delivery must be according to custom and usage of the port, and such delivery will discharge the carrier of his responsibility."

The duty imposed on carriers by the Harter Act to make "proper delivery" was a codification of one of the "well known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes." *The Delaware* 161 U. S. 459 (1896). The general maritime law long recognized that a carrier could properly deliver either to a wharf or elsewhere by constructive delivery. *The Eddy*, 72 U. S. 481 (1866). The general rules outlined in the *Eddy* applied when there was not a law, regulation, or custom of the port providing otherwise. In *The Tangier*, 64 U. S. 28, 39, (1859) the principals of proper delivery in ocean carriage were reviewed by the Supreme Court:

> "Where the contract is to carry by sea, from port to port, an actual or manual tradition of the

goods *into the possession of the consignee*, or his warehouse, *is not required in order to discharge the carrier* from his liability as such. * * * He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf."

In 1913, Judge Hough held, in the *Portuguese Prince*, 209 F. 995 (S. D. N. Y. 1913), that the Harter Act did not make improper a substituted delivery in accordance with established custom, nor render void a provision in a bill of lading authorizing delivery "on a quay or into hired lighters if necessary, but at the expense and risk of the owner of the goods." Judge Hough said in a well reasoned Opinion:

"

> The language of the bill of lading under consideration has long been familiar to shippers and their counsel; it is the ordinary form of words by which a carrier is authorized to make a substituted delivery. The form of words long antedated the Harter Act, and a substituted delivery, whether by contract or usage, has long been known to the law. The draftsmen of the Harter Act is presumed to have known that there was more than one kind of delivery, or more than one method of making delivery. The obligation of the statute is not to deliver in any peculiar manner, or any one manner, or any special manner, but only to properly deliver.
>
> The final question, therefore, is whether a reasonable substituted delivery based upon contract and strengthened by long custom is a proper delivery. It was a proper delivery before the passage of the Harter Act, and, during more than 20 years which have elapsed since that statute became effective, no case has arisen (so far as I know) in which the second section of the act has been applied to these familiar words of the bill of lading."

In *Federal Insurance Co.* v. *American Export Lines, Inc.*, 113 F. Supp. 540 (S. D. N. Y., 1953), Judge Dimock passed on the identical clauses now in question and held them to be valid as clauses which measure the carrier's obligation, not clauses which exculpate the carrier from consequences of a breach.

It was undisputed that lighterage in this case was necessary and that American Export could not and did not operate lighters at that port. The ocean freight did not include lighterage. The consignee paid the lighterman, Rippon, for receiving services and for lighterage. The local law made the lighter operator or owner responsible for the goods after discharge from ship's tackle, and therefore the local consignee was fully protected. Under these circumstances it was fair and reasonable for the parties to agree that delivery should take place onto lighters at the end of ship's tackle.

It is submitted that § 1 of the Harter Act does not deal with the scope of the Carrier's Obligation as to place of delivery. The Act does not determine how, when or where the carrier shall deliver the cargo, but only prevents the carrier from avoiding liability for loss arising from its fault or negligence in making delivery to such place as the carrier has in fact undertaken to deliver the cargo.

3. Erroneous Application of Presumptions

The Court of Appeals erred in raising against the owner of the ocean vessel a presumption that the lighter was unseaworthy because it careened in fair weather. The ocean-carrier did not own, operate or control the lighter in question. The two cases cited by the Court of Appeals are not in point. In *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941), the presumption was raised against the chartered owner of a tank barge

employed to transport molasses in New York Harbor from vessels to consignees. Moreover, as the Supreme Court pointed out in that case, in raising a presumption against a party, "the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach." Here only Caterpillar's underwriters appointed a qualified surveyor to investigate the cause of the accident and libelant failed to produce his report, although it was repeatedly demanded. This alone was sufficient to raise a presumption against libelant which would have shifted any duty of producing the evidence back on libelant. WIGMORE ON EVIDENCE § 2493 (3rd Ed., 1940). It has long been the rule that the failure of a party to produce relevant and important evidence of which he has peculiar control, raises a presumption that the evidence would be unfavorable to his cause. *Tendler* v. *Jaffé*, 203 F. 2d 14 (D. C. Cir. 1953) *cert. den.* 346 U. S. 817 (1953). The report of another surveyor which was produced contained discrepancies which were highly suspect. *Gratsos* v. *The Moisie Bay*, 287 F. 2d 706 (4th Cir., 1961). In other cases cited, *The Jungshoved*, 290 Fed. 733 (2d Cir., 1923) *cert. den.* 263 U. S. 707 (1923), the presumption was raised against the owner of the lighter.

The evidence was that the lighter righted itself after the accident and after inspection was placed back in service. There was no evidence that she was pumped or that any repairs were necessary. The only witness who speculated that there "must have been" water in the lighter, Mr. Williams refused to produce his report of investigation. Libelant's other expert witness, Capt. Kuhne, testified that the accident could just as well have been caused by the tractors shifting because they were not properly chocked by the lightermen or because the brakes were not set at the

factory (Appendix Record, Vol. 4, p. 42). It was not only error but manifestly unfair in such situation to place on the ocean carrier the burden of explaining the movements of the lighter which was not under its operation or control.

It was also error for the Court of Appeals to hold that Caterpillar had made out a *prima facie* case "by showing that its goods were received in damaged condition at the port of destination." There was no such showing by libelant. Respondent placed in evidence *clean receipts* obtained for the goods both from the lighterman and the port authorities, who were authorized by Port Regulations to receive the goods on behalf of consignee. Furthermore there was no proof that libelant filed claim against the ocean carrier "before or at the time of removal of the goods" or "within three days" as required by 46 U. S. C. § 1303 (6). That section provided that failure to file such notice "shall be prima facie evidence of delivery by the carrier of the goods as described in the bill of lading."

4. The Trial Court's Findings were not clearly erroneous.

The Court of Appeals failed to apply the long accepted "clearly erroneous" standard of review to the findings of fact made by the Trial Court, yet reached a result as though evidentiary as well as ultimate findings of fact were clearly erroneous when obviously they were not. The Court of Appeals, by reaching the conclusion it did, summarily brushed aside all the following findings of fact which the Trial Court made from evidence obtained from live witnesses as well as depositions:

1. That the parties contemplated delivery would take place onto lighters.

2. That lighters at Tripoli were not operated by the respondent but by Rippon, a local shipping agent, licensed to operate lighters and receive goods.

3. That the shipowner had no choice of lighters.

4. That the shipowner was not permitted to open manholes or pump lighters.

5. That the ship's stevedore made a normal and reasonably careful inspection of the lighter before discharging cargo.

6. That the lighter was seaworthy.

7. That the loss was not caused by respondent's negligence.

1-5 were evidentiary facts and most of evidence came from Tripoli Port Regulations and from libelant's own witness, Mr. Williams. Captain Kuhne, libelant's expert witness testified that, aside from the possibility that there was water in the lighter, the accident could just as well have been caused by the lightermen's failure to secure the tractors properly or from the failure of the shipper to set the brakes at the factory. Captain Kuhne was a live witness. The Trial Court's conclusion that the lighter was seaworthy shows that the judge did not accept Captain Kuhne's explanation of the reasons for believing there might have been water in the lighter. There is no direct proof in the entire record that water was ever found in the lighter. Libelant's surveyor's report on the cause of the accident would have contained such proof if it existed. That is the report which libelant and the surveyor failed to produce. Certainly the Trial Judge was entitled, under these circumstances, to reject the surveyor's uncertain opinion that the lighter "must have contained water".

In *McAllister* v. *United States*, 348 U. S. 19, 20 (1954). The Court said that a finding of the District Court could not be reversed unless it was clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed." The Court held the Circuit Court had erred in reversing the District Court's findings even though it was possible that the opposite inference was true.

In *Guzman v. Pichirilo*, 369 U. S. 698 (1962), the Supreme Court, in reversing the Court of Appeals, said that in the case of ambiguous testimony:

> "The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on review only if 'clearly erroneous'."

A finding by an Admiralty Trial Court as to the issue of negligence, or as to unseaworthiness, is one of fact not to be upset on appeal unless clearly erroneous. The Ninth and Sixth Circuit have followed this rule since the *McAllister* decision. *Ramos v. Matson Navigation Co.*, 316 F. 2d 128 (9th Cir., 1963); *Pacific Tow Boat v. States Marine Corp.*, 276 F. 2d 745, 752 (9th Cir. 1960); *Imperial Oil Ltd., v. Drlik*, 234 F. 2d 4, 10 (6th Cir. 1956) *cert. den.* 352 U. S. 941 (1956). The Second Circuit disagrees and feels free to re-try the issues of negligence and seaworthiness all over again on Appeal. *Romero v. Garcia & Diaz, Inc.*, 286 F. 2d 347 (2 Cir., 1961) *cert. den.* 365 U. S. 869 (1961). It is submitted that the Second Circuit is in error and that the conflict should be resolved.

CONCLUSION

A WRIT OF CERTIORARI SHOULD BE GRANTED IN ACCORDANCE WITH THE PRAYER OF THIS PETITION.

Dated: New York, N. Y., September 18, 1963.

MARIO E. DE ORCHIS,
Counsel for Petitioner,
80 Broad Street,
New York 4, New York

CLIFFORD J. BRENNER,
Of Counsel

APPENDIX A

(Opinion of Metzner. D. J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Ad. 60

CATERPILLAR OVERSEAS, S. A.,
Libellant,
—*against*—
S. S. EXPEDITOR and
AMERICAN EXPORT LINES, INC.,
Respondent

APPEARANCES:

BIGHAM, ENGLAR, JONES & HOUSTON,
Proctors for libellant

By: F. HERBERT PRIM

HAIGHT, GARDNER, POOR & HAVENS
Proctors for respondent

By: M. E. DE ORCHIS and CLIFFORD J. BRENNER

METZNER, *District Judge*.

This libel seeks to recover damages to cargo. The libellant shipped two tractors to Tripoli on board respondent's vessel. When the vessel reached the Port of Tripoli, it discharged the tractors onto a lighter. Shortly thereafter the lighter listed to one side, and the tractors were cast overboard. The lighter was hired by respondent's local agent, but the charge for the lighterage was billed to the consignee.

The consignee was neither consulted by the agent concerning the use of the lighter nor notified of the discharge of the tractors.

Respondent denies liability on two grounds. First, that pursuant to the provisions of the bill of lading it had made delivery of the tractors when they were placed upon the lighter. Second, that any loss was not due to its negligence.

The pertinent provisions of the bill of lading are contained in three separate clauses. Clause 1 provides that "The Carrier shall not be liable in any capacity whatsoever for . . . loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier."

Clause 4 provides that the carrier may discharge the goods onto a craft and when they are so discharged "they shall be at their own risk and expense" and "such discharge shall constitute complete delivery and performance under this contract".

Clause 12 provides that the carrier "may discharge the goods directly they come to hand, at or onto any wharf, craft or place that the Carrier may select" and that all lighterage and use of craft in discharging "shall be at the risk and expense of the goods."

It is contended by the libellant that the above clauses are exculpatory clauses violative of the provisions of the Harter Act, 46 U. S. C. §§ 190, 191 et seq.[1] Since the cargo had left the ship's tackle, the Carriage of Goods by Sea Act (46 U. S. C. § 1300 et seq.) is not applicable. *Federal Ins. Co. v. American Export Lines*, 113 F. Supp. 540, 542 (S. D. N. Y. 1953) and cases cited therein. The Harter

[1] The Harter Act provides that it is unlawful to insert in any bill of lading any clause relieving the carrier from "liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery" of property committed to its charge.

Act governs a carrier's obligations after the goods have been discharged from the ship's tackle and before they have been delivered. *Isthmian S. S. Co. v. California Spray-Chemical Corp.*, 290 F. 2d 486, 489 (9th Cir. 1961). * * *

The issue presented is, where was delivery to be made? In *Federal Ins. Co. v. American Export Lines, supra*, the court was dealing with a bill of lading identical in form to the one at bar. Judge Dimock said in that case, in discussing clause 12 of the bill of lading, that:

> "I have come to the conclusion that the contract relations between the parties had come to an end when the goods were deposited on the lighter. . . . Where the carrier discharges the goods into a lighter of its selection at the port of discharge that satisfies its contractual obligation. The clause which permits that is one which measures the carrier's obligation, not one which exculpates the carrier from the consequences of a breach. [Citing cases]. Since the contractual relationship of the parties had terminated before the accident here the contractual limitation can have no effect on its consequences." 113 F. Supp. at 543.

In *The Portuguese Prince*, 209 Fed. 995 (S. D. N. Y. 1913) Judge Hough was discussing a clause in a bill of lading, similar to clause 12 in the case at bar, providing that the ship might unload onto hired lighters if necessary, but at the expense and risk of the owners of the goods. He said that the respondent in that case was entitled to a dismissal of the libel "unless the very ingenious argument advanced in respect of the Harter Act shall prevail." His opinion seems to be a complete answer to libellant's contention here, and the pertinent portion reads as follows:

> "The language of the bill of lading under consideration has long been familiar to shippers and their counsel; it is the ordinary form of words by

which a carrier is authorized to make a substituted delivery. The form of words long antedated the Harter Act, and a substituted delivery, whether by contract or usage, has long been known to the law. The draftsman of the Harter Act is presumed to have known that there was more than one kind of delivery, or more than one method of making delivery. The obligation of the statute is not to deliver in any peculiar manner, or any one manner, or any special manner, but only to properly deliver.

"The final question, therefore, is whether a reasonable substituted delivery based upon contract and strengthened by long custom is a proper delivery. It was a proper delivery before the passage of the Harter Act, and, during more than 20 years which have elapsed since that statute became effective, no case has arisen (so far as I know) in which the second section of the act has been applied to these familiar words of the bill of lading." 209 Fed. at 997.

Neither *Mackey* v. *United States*, 197 F. 2d 241 (2d Cir. 1952), nor *Morris* v. *Lamport & Holt, Ltd.*, 54 F. 2d 925 (S. D. N. Y. 1931), cited by libellant, is in point here, since in both cases the court found that the damage occurred while the goods were in the custody of the carrier under the bills of lading.

This brings us to two of the other cases relied on by the libellant. In *Isthmian S. S. Co.* v. *California Spray-Chemical Corp.*, *supra*, in which a petition for rehearing was granted and the original opinion adhered to (300 F. 2d 41, 9th Cir. 1962), the court, in considering the application of the Harter Act, said that it was "essential to determine *what* a proper delivery is, and *when* such delivery is completed." 300 F. 2d at 43. The majority of the court said that there was strong support for the existence of a maritime rule requiring delivery to a wharf, and that the parties under-

stood that the obligation created between them required delivery to the wharf. The court said that its holding went only to the fact that "a carrier cannot relieve itself of liability occurring during such lightering or at any time before proper delivery." It went on to say that "the Harter Act seems to contemplate a *carrier liability* which continues up until 'proper delivery' has been effected, regardless of when the carrier's *obligation to transport* the goods ceases." 300 F. 2d at 46. The court therefore held invalid a clause in the bill of lading which provided that the carrier may lighter the goods at the risk and the expense of the goods.

In the original opinion in that case the court was of the view that if proper delivery is completed as soon as the cargo leaves the ship's tackle then the Harter Act could never have become operative. However, I fail to see why it is not possible for delivery and discharge to coincide if the parties so agree. The scope of the Harter Act goes to the obligations of the carrier within the limits of its contractual undertaking.

The concurring opinion indicated that the Harter Act does not deal with the scope of the carrier's obligation as to the place of delivery, but only prevents it from avoiding liability for negligence in delivery to such place as the carrier undertakes to make delivery. Judge Pope said that "there is no limitation in the Act upon the power of the parties to contract or to stipulate where delivery is to be made". 300 F. 2d at 50.

Finally, we come to *North American Smelting Co. v. Moller S. S. Co.*, 204 F. 2d 384 (3d Cir. 1953). In that case the goods were delivered from the deck of the ship onto the pier. Part of the shipment was removed by the consignee on one day, and on the following day some of the merchandise was found missing. The bill of lading provided that the merchandise was at the risk of the consignee as soon as

delivered from the tackle at the port of discharge, and if the goods were not taken away the same day that they might be permitted to lie where landed at the expense and risk of the goods. Counsel for the carrier admitted on the argument that he could not rely on the bill of lading, which if applied literally would have disposed of the case in his favor. The court said that "This admission was well made in view of the language of the Harter Act." 204 F. 2d at 386.

In view of the decisions in *Federal Ins. Co. v. American Export Lines, supra*, and *The Portuguese Prince, supra*, I fail to see why "This admission was well made". I find on the authority of these two cases that delivery was made to the lighter in conformity with the agreement of the parties, and the Harter Act is inapplicable under the circumstances.

The libel is dismissed. So ordered.

Dated: New York, New York
June 4, 1962

CHARLES M. METZNER
U.S.D.J.

APPENDIX B

(Opinion of Metzner, D. J., on Reargument)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

METZNER, *District Judge*:

The libellant has requested reargument of the court's decision in favor of the respondent rendered after trial. It has presented for the first time a theory upon which it claims that recovery could be based and which it claims it had previously overlooked. It is significant that the proctor for the libellant was the proctor for the successful party in one of the cases upon which it now relies. *Remington Rand, Inc.* v. *American Export Lines, Inc.*, 132 F. Supp. 129 (S. D. N. Y. 1955). In that case success was predicated upon a finding that the Carriage of Goods by Sea Act, known as COGSA (46 U. S. C. § 1300 et seq.), was inapplicable. Now the same proctor argues the reverse of that proposition and seeks a holding that COGSA is applicable, a proposition which in its trial memorandum it expressly denied (see pages 11-13). In fact, in order to show how sound that position was it referred to public statements to the same effect by the senior partner of the firm of proctors representing the respondent in this lawsuit. The court has examined the authorities and adheres to its original determination.

COGSA applies during "the period from the time when the goods are loaded on to the time when they are discharged

from the ship." 46 U. S. C. § 1301(e). Libellant's contention on reargument is that when discharge is made into a lighter, it is not complete as to the cargo of one shipper while cargo of other shippers is still to be placed in the lighter. Thus libellant argues that it is immaterial that all of *its* cargo had been placed on the lighter at the time of the accident, since it contends that other cargo was yet to be unloaded onto that lighter.

Under the facts of the instant case the court found that neither COGSA nor the Harter Act (46 U. S. C. §§ 190, 191) applied since discharge and delivery had been made when all of libellant's cargo had been placed upon the lighter.

The cases relied upon by libellant to sustain its theory are *Remington Rand, Inc. v. American Export Lines, supra*; *Hoegh Lines v. Green Truck Sales, Inc.*, 298 F. 2d 240 (9th Cir. 1962), *cert. denied*, 31 U. S. L. Week 3116 (U. S. Oct. 9, 1962); *Goodwin, Ferreira & Co. v. Lamport & Holt, Ltd.*, 34 Lloyd's List L. R. 192, 194 (K. B. 1929). Incidentally, the *Remington Rand* case had been cited in the libellant's original trial memorandum for the proposition that COGSA did not apply because it only covers cargo from "tackle to tackle." Upon rereading that case it is clear that libellant's original reading was correct.

In *Remington Rand* the vessel was discharging various cargoes at Bombay destined for different consignees. Some of the cargo was discharged onto the pier and some into lighters. Some twenty-four hours after discharge of the entire cargo destined for Bombay, a fire broke out on one of the lighters. This lighter held some of libellants' goods and some destined for other consignees. The court held COGSA inapplicable, since libellants' cargo had left the ship's tackle, and relied on *Federal Ins. Co. v. American Export Lines*, 113 F. Supp. 540 (S. D. N. Y. 1953) and

Mackey v. *United States*, 83 F. Supp. 14 (S. D. N. Y. 1948) *aff'd* 197 F. 2d 241 (2d Cir. 1952). The court in several places referred to "the discharge of libellants' cargo . . . having been completed." (conclusions of law Nos. 8 and 11). Since the lighterage had been arranged and paid for by the respondent, the cargo was found to have been within the "non-possessive custody period" referred to in the *Federal Ins. Co.* case, *supra*, and therefore the Harter Act was held applicable. In the instant case, lighterage was at the risk and expense of the goods.

The holding in *Remington Rand* therefore, insofar as COGSA was concerned, referred to a case where all cargo had been discharged, and that was all that concerned the court. The court did say at page 137 that discharge is accomplished by transferring the cargo to a chartered lighter "when that loading has been completed or while no other cargo is being loaded into the same lighter." However, this statement is clearly dictum in view of the fact situation before the court.

In the *Hoegh* case the libellant's cargo was still being discharged and therefore the case is not in point. The court referred to the *Federal Ins. Co.* case as being inconsistent with its holding and with *Remington Rand*. However, in the *Federal Ins. Co.* case the libellant's cargo had already been discharged and therefore on the facts it is not inconsistent with *Hoegh* or *Remington Rand*. As pointed out above the court in *Remington Rand* relied upon the *Federal Ins. Co.* case as authority for its holding.

The one case that does support libellant's position is the English case of *Goodacre* v. *Ferreira*, *supra*.

In the *Mackey* case, libellants' cargo was on lighters that had been secured alongside the ship, pursuant to directions of the ship, and loading had been commenced. Because of this control the court found delivery had been

made despite the fact that lighterage had been arranged for by the shipper. COGSA was held applicable because the bill of lading so provided. The facts are fully set forth in the opinion of the district court, *supra*.

Aside from the *Goodwin, Ferreira* case, *supra*, the pertinent authority in this country would appear to support the "tackle to tackle" rule and the inapplicability of COGSA where a shipper's consignment has been fully discharged, without reference to whether other cargo is still to be discharged.

On reargument the original determination is adhered to. So ordered.

Dated: New York, N. Y.
November 14, 1962

CHARLES M. METZNER
U. S. D. J.

APPENDIX C

(Opinion of Waterman, *C. J.*)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 245—October Term, 1962

Docket No. 27956

CATERPILLAR OVERSEAS, S. A.,
Libellant-Appellant,

v.

S. S. EXPEDITOR and AMERICAN EXPORT LINES, INC.,
Respondent-Appellee.

Before:

CLARK, and WATERMAN, *Circuit Judges,*
and ANDERSON, *District Judge.*

Appeal from a final decree in admiralty, 210 F. Supp. 478, United States District Court for the Southern District of New York, Metzner, *J.*, dismissing the libel in appellant's action for damage to cargo. Reversed and remanded.

APPEARANCES:

BIGHAM, ENGLAR, JONES & HOUSTON (F. Herbert Prem, of counsel), *for Libellant-Appellant.*

HAIGHT, GARDNER, POOR & HAVENS (M. E. DeOrchis, Clifford J. Brenner, of counsel), *for Respondent-Appellee.*

OPINION OF THE COURT
(Filed June 20, 1963)

WATERMAN, *Circuit Judge*:

Caterpillar Overseas, S. A. appeals from a final decree in admiralty denying recovery in its action against American Export Lines, Inc. for damage to cargo. The decree was entered in the United States District Court for the Southern District of New York, Metzner, *J.*, where jurisdiction was based upon 28 U. S. C. § 1333.

On December 30, 1959, Caterpillar shipped two tractors from New York to Tripoli, Libya, on appellee's vessel, the S.S. *Expeditor*. Because the vessel's draft was too deep for a berth at the port of Tripoli, the ship anchored, upon arrival, in the Tripoli harbor. There the tractors were transfered from the S.S. *Expeditor*, by use of her tackle operated by stevedores, to the deck of a steel lighter which was secured by lines to the ship. The lighter had been hired and the stevedores employed by W. E. Rippon & Sons, appellee's agent in Tripoli for many years. The lighterage was billed to the consignee of the cargo, but, as permitted by the bill of lading, the consignee was neither consulted by the ship's agent concerning the use of the lighter nor notified of the arrival of the ship.

After the tractors had been placed on the deck of the lighter and chocked, and while the stevedores were lifting a sling load of additional cargo from the ship's hold, the lighter listed toward the ship and the two tractors were cast overboard. They were subsequently raised and deposited on the quay in a damaged condition.

At the trial below, American Export Lines sought to escape liability by setting up three exculpatory clauses in

the bill of lading,[1] the net effect of which was to excuse the carrier from any liability for loss or damage to the goods when they were not in its actual custody, or when they had been "discharged" onto a wharf or lighter. Moreover, American Export denied that it was negligent in the handling of appellant's cargo. Caterpillar sought to establish defendant's negligence by offering proof that the lighter was unseaworthy and that it was given only a perfunctory examination by American Export's agents before use. Caterpillar also maintained that the exculpatory clauses in the bill of lading, relied upon by appellee, were void under Section 1 of the Harter Act, 46 U. S. C. § 190 *et seq.*, or Section 3(a) of the Carriage of Goods by Sea Act (COGSA), 46 U. S. C. § 1300 *et seq.* The district court ruled that the Harter Act and COGSA were inapplicable to the facts of this case, gave effect to the exculpatory clauses of the bill of lading, and held that American Export was not liable for the damage to appellant's cargo. We reverse and remand ~~for a new trial~~ *with instructions that a decree be entered in favor of libelant, Caterpillar Overseas, Inc.**

Under the general law of maritime carriage, public carriers of goods by sea were absolutely responsible for their safe arrival, subject to certain common-law exceptions not here relevant. *The Propellor Niagara* v. *Cordes*, 21 How. 7

[1]Clause 1: "The Carrier shall not be liable in any capacity whatsoever for * * * loss of or damages to the goods occurring while the goods are not in the actual custody of the Carrier."

Clause 4: "When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility."

Clause 12: "All lighterage and use of craft in discharging shall be at the risk and expense of the goods."

*Striking out and italics as per Amendment of July 9, 1963.

(1858); Carver, Carriage of Goods by Sea 3-20 (9th ed. 1952). During the Nineteenth Century shipowners sought to limit their stringent liabilities for loss or damage to cargo by inserting exculpatory clauses in their bills of lading. Some of these clauses exempted the carrier from liability for loss due to particularly-described perils and causes. Others went so far as to relieve the carrier from liability for the results of his own negligence. Because of the superior bargaining position of the carriers, shippers of goods were largely powerless to avoid the proliferation of these exceptions to liability, and bills of lading became contracts of adhesion forced upon shippers by carriers. See generally Gilmore & Black, The Law of Admiralty 119 *et seq.* (1957); Note, 27 Texas L. Rev. 525 (1949).

In 1893 Congress sought to eliminate these abuses by enacting the Harter Act, 46 U. S. C. § 190 *et seq.* Section 1 of the Act provides that:

> "It shall not be lawful for the * * * owner of any vessel transporting * * * property from or between ports of the United States and foreign ports to insert in any bill of lading * * * any clause, * * * whereby it * * * shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of * * * property committed to its * * * charge. Any and all words or clauses of such import inserted in bills of lading * * * shall be null and void and of no effect."

Section 2 declares of no effect any attempt to lessen, weaken or avoid the obligations of the owner to exercise due diligence properly to make the vessel seaworthy. In 1936, the Harter Act was supplanted, in large part, by the Carriage of Goods by Sea Act, 46 U. S. C. § 1300 *et seq.*, which reaffirmed the carrier's liability for loss or damage to cargo caused by its own negligence. COGSA's coverage,

however, extends only to the period, in foreign commerce, "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U. S. C. § 1301(e). Harter remained applicable, therefore, to the period between the discharge of cargo from the vessel and its proper delivery. Gilmore & Black, *supra* at 120.

~~American Export does not contest the fact that under~~ *Under** general maritime law, a port contract of carriage ordinarily requires the carrier to deliver goods into the possession of the consignee, or at least to place the goods upon a fit wharf at the port of destination. See *Tan Hi v. United States*, 94 F. Supp. 432 (N. D. Cal. 1950); *The Titania*, 131 Fed. 229, 230 (2 Cir. 1904); *The Mary Washington*, 16 Fed. Cas. 1006, No. 9, 229. This duty of proper delivery is not, of course, conterminous with the duty to transport. *Isthmian Steamship Co. v. California Spray Chemical Corp.*, 300 F. 2d 41, 46 (9 Cir. 1960); nor is it affected by the allocation of costs between carrier and shipper. *Ibid.* Thus the carrier remains liable for negligence even if, as here, the goods are required to be off-loaded in the harbor and carried to shore by means of a lighter, and even if it is agreed that the shipper shall bear the costs of lighterage. Under Section 1 of the Harter Act, therefore, Clauses 1 and 12 of the present bill of lading, taken by themselves, would appear to be void insofar as they attempt to shift the risk of lighterage to the goods.

Appellee relies primarily, however, upon Clause 4 of its bill of lading which purports to make *delivery* of the goods, and thus the termination of the carrier's statutory and contractual liability, concurrent with *discharge of the cargo* from the vessel, wherever that discharge may take place:

> "4. In any situation whatsoever and wheresoever occurring * * * which in the judgment of the

*Striking out and italics as per Court's correction.

carrier or the Master is likely to give rise to * * * delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual or agreed place of discharge in such port, * * * the Carrier or the Master * * * may discharge the goods into depot, lazaretto, craft, or other place; or * * * may discharge and forward the goods by any means * * *. The Carrier or the Master is not required to give notice of discharge of the goods or the forwarding thereof as herein provided. When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility.* * *" (Emphasis supplied.)

The purpose of the clause is apparent. By equating "discharge" with "delivery" the carrier seeks to eliminate the operation of the Harter Act upon foreign trade. By fiat it seeks to secure immunity from liability which no combination of mere exculpatory clauses could achieve. All of this it purports to accomplish in the name of a freedom of contract, which Congress, in enacting Harter and COGSA, found to be largely fictional in view of the disparate positions of the parties.

The Harter Act does not define "proper delivery," however. It remains to be determined, therefore, whether such a delivery may be accomplished by the mere discharge of goods from the vessel, wherever that discharge may take place.

In *Isthmian Steamship v. California Spray-Chemical Corp.*, 290 F. 2d 486 (9 Cir. 1961), *on reargument*, 300 F. 2d 41 (1962), cargo was discharged from the carrier's vessel, in the harbor at Alexandria, Egypt, to a lighter for onecarriage to the dock. In an action for damage to the

cargo while it was on the lighter the carrier's defense was based upon two bill of lading clauses which authorized the carrier to effect "delivery" of the cargo by discharging it onto lighters "at the risk and expense of the goods * * * without any responsibility whatsoever." Holding the clauses void under Section 1 of the Harter Act, the Ninth Circuit ruled that "proper delivery" under the Act, in the absence of port customs and regulations to the contrary, constitutes delivery at a fit and customary wharf. See *Morris* v. *Lamport & Holt, Ltd.*, 54 F. 2d 925, 926 (S. D. N. Y. 1931); *aff'd per curiam*, 57 F. 2d 1081 (2 Cir. 1932); *North American Smelting Co.* v. *Moller S. S. Co.*, 204 F. 2d 384, 386, 388 (3 Cir. 1953); *Remington Rand, Inc.* v. *American Export Lines*, 132 F. Supp. 129 (S. D. N. Y. 1955).

On the facts of this case we are not required to determine whether proper delivery under a port to port contract of maritime carriage may only be made by discharge onto a fit wharf. On the contrary, we should suppose, for example, that in a case where the consignee owns his own lighter and has his own stevedores, the Harter Act would not prohibit a properly drafted agreement providing for delivery of goods by discharge onto the consignee's lighters. Here, however, the lighter was not selected by the shipper nor by the consignee of the goods, but by the carrier. Under these circumstances, proper delivery requires, at the very least, the selection of, and the discharge of the goods onto, a fit and safe lighter. See *The Tonawanda*, 23 How. 28 (U. S. 1859). This obligation, for the negligent performance of which the carrier bears full responsibility, might be found as an implied term of the bill of lading before us; but insofar as the lighterage clauses have been construed by both the parties and the Court below so as to relieve the carrier of this duty, we are constrained to

hold the clauses null and void under Section 1 of the Harter Act.

At the trial below appellant established a prima facie case for recovery by showing that its goods were received in damaged condition at the port of destination. *Schnell v. The Vallescura*, 293 U. S. 296, 304 (1934); *Schroeder Bros. Inc. v. The Saturnia*, 226 F. 2d 147, 149 (2 Cir. 1955); Gilmore & Black, The Law of Admiralty, 162-63 (1957). Appellant further established that the damage was not due to the operation of the lighter during oncarriage from the vessel to the dock, for the Court below found that appellant's tractors were cast overboard while goods were still being off-loaded onto the lighter and while the lighter was secured by lines to the ship.

Upon this showing, American Export Lines had the burden of proving that the loss was due to an excepted cause under its bill of lading. Because of the invalidity of Clauses 1, 4 and 12, however, American Export could only rely upon Section 4(2)(q) of COGSA (incorporated into the present bill of lading by agreement of the parties) which provides:

> "4(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> * * *
>
> "any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but

---

[2]Caterpillar argues, as an alternative ground for reversing the judgment below, that its tractors were not "discharged" at the time they were cast overboard, because the loading of the lighter was not fully completed before the accident occurred. See *Remington Rand Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129, 137 (S. D. N. Y. 1955); *Hoegh Lines v. Green Truck Sales, Inc.*, 298 F. 2d 240, 249 (9 Cir. 1962), cert. denied, 371 U. S. 817. We find it unnecessary, however, to rule on this issue. If injury to the goods occurred before their discharge from the vessel, Section 3(2) of COGSA would invalidate any agreement purporting to shield the carrier from liability for negligence in the handling of the goods. If the goods were discharged but not delivered at the time of the injury, Section 1 of the Harter Act would control.

> the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

We hold that appellee failed below to sustain this burden of proof. The trial court found that the lighter careened in fair weather and a calm sea, and, as appellee failed to advance any explanation of this occurrence, a presumption of unseaworthiness arose which appellee failed to rebut. *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104, 111-12 (1941); *The Jungshoved*, 290 Fed. 733, 2 Cir. 1923), *cert. denied* 263 U. S. 707. This presumption gained support from Caterpillar's affirmative proofs tending to show that the lighter had a holed side plate and warped tank top lids and no gaskets, which permitted water to enter the lighter's tanks and thereby to render it unstable.

Although a presumption of actual unseaworthiness did not preclude American Export Lines from proving that it exercised due care in *attempting* to select a seaworthy lighter, little such evidence was forthcoming. Appellee's agent, a stevedore foreman, allegedly took a 5 or 10 minute walk over the deck of the lighter, prior to the tractors' off loading, but no attempt was made to ascertain whether water was in the lighter's tanks and no inspection was made of the lighter's sides. Upon such a factual showing we hold that a finding of due care in the selection of the lighter could not be sustained.[3]

Reversed and remanded.

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[3] Although the court below found that the loss was not caused by respondent's negligence, this finding was apparently premised upon the belief that Clauses 1, 4 and 12, even if ineffective to shield the carrier from liability for negligence, shifted the burden of establishing American Export's negligence to appellant. Properly drafted lighterage clauses might well have achieved this result; the exculpatory provisions of the present bill of lading, however, were rendered void under the Harter Act even for purposes of forcing the shipper to prove negligence. *Isthmian Steamship Co. v. California Spray-Chemical*